

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 March 2016

Public Authority: Manchester City Council
Address: Town Hall
Manchester
M60 2LA

Decision (including any steps ordered)

1. The complainant has requested information relating to an Electronic Asset Management System contract. Manchester City Council provided some of the information but withheld other information under the exemption for prejudice to commercial interests (section 43(2) of the FOIA).
2. The Commissioner's decision is that Manchester City Council breached section 10(1) and failed to demonstrate that section 43(2) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose the costs quoted by the respective organisations.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Request and response

5. On 28 July 2015, the complainant wrote to Manchester City Council (the "council") and requested information in the following terms:

"On 25 August 2011 there was a contract notice published for an Electronic Asset Management System. In relation to this contract, I would like to know the following:

(1) Who was the contract awarded to and what was the agreed value for delivery of the project with the chosen supplier?

(2) Who were the other bidders for the contract and what costs were quoted by the respective organisations?

(3) When is the contract due to end?

(4) Will the contract be advertised publically to bidders ahead of the end of the current contract"

6. The council responded on 5 November 2015 and disclosed all the information, except for the "...costs quoted by the respective organisations" requested in part 2, which it withheld under the exemption for prejudice to commercial interests (section 43(2)). The council also did not provide the "agreed value for delivery of the project", requested in part 1; however, it did not specify the grounds for doing this.
7. Following an internal review the council wrote to the complainant on 8 December 2015. It stated that it was maintaining its position.

Scope of the case

8. On 15 December 2015 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. Subsequent to the complaint being submitted to the Commissioner, the council disclosed the "agreed value for delivery of the project" specified in part 1 of the request. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly withheld the information specified in part 2 of the request.

Reasons for decision

Section 43(2) – prejudice to commercial interests

10. The council has withheld the costs quoted by the unsuccessful bidders for delivery of the Electronic Asset Management System contract.
11. Section 43(2) provides an exemption from disclosure for information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is therefore subject to the public interest test.

12. "Commercial interests" in the context of this exemption encapsulates a wide variety of activities. In this case, the withheld information relates to the awarding of a contract for the provision of a service. The Commissioner is satisfied that the information falls within the scope of the exemption.
13. In order for the exemption to be engaged it is necessary for it to be demonstrated that disclosure of information would result in some identifiable commercial prejudice which would or would be likely to be affect one or more parties.
14. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice 'would' occur or prejudice 'would be likely to' occur.
15. With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15).
16. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
17. The council has stated that disclosure of the information would have a "*negative impact on the competitiveness of the tender process and would distort the competitive process which may or may not commence in 2016*". The Commissioner understands, therefore, that the council is relying on the second limb of the likelihood test, namely, that disclosure *would* result in prejudice to its own commercial interests.

The nature of the prejudice

18. In its initial refusal notice the council did not identify the specific prejudice which it considered engaged the exemption, focussing instead purely on public interest arguments.
19. At the internal review stage the council stated that it "*....is required to ensure that its procurement process remains competitive to ensure that we obtain best value for money and services. The Council's view is that the disclosure of costs would have a negative impact on the competitiveness of the tender process, and would distort the competitive process which may or may not commence in 2016.*"

20. In its submissions to the Commissioner the council acknowledged that the extent to which information is commercially sensitive is time-dependent. However, in spite of the fact that the relevant tender process had completed at the time of the request, the council considered that the information should remain withheld because *"....a competitive process may commence within the next three months and disclosure of costs quoted by organisations may place in the public domain information that may distort competition."*
21. The Commissioner is reminded that in order for the exemption to be engaged it is necessary for it to be demonstrated that the disclosure of information would result in some identifiable commercial prejudice. So, the prejudice must be clearly identified, linked to the specific information being withheld and the likelihood of the prejudice occurring must be shown to be more likely than not.
22. In this instance, the council has identified a generic concept, namely the distortion of competitive process, which it considers "may" be an outcome of the information being disclosed. It has not defined what form this distortion would take, nor has it explained how disclosing the information would produce such a distortion.
23. In cases where an authority has provided insufficient arguments in support of the application of an exemption, the Commissioner does not consider it his role to generate arguments on its behalf. In this case, he considers that the council's arguments do not transcend generic, indistinct assertions of the potential outcome of disclosure and that it has failed to show that the threshold for engaging the exemption has been met.
24. As the Commissioner has concluded that the exemption is not engaged he has not gone on to consider the public interest.

Section 10 – time for compliance

25. Under section 1(1) of the FOIA a public authority must confirm or deny whether the information specified in a request is held and, where it is, provide it to a requester.
26. Section 10(1) of the FOIA requires a public authority to comply with section 1(1) within 20 working days of the date of receipt of the request.
27. In this case the request was made on 28 July 2015 and the council responded on 5 November 2015. As the council failed, by some margin, to respond within 20 working days, the Commissioner finds that it breached section 10(1).

Right of appeal

28. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

29. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
30. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Andrew White
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